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No. 83-1182

# In the Supreme Court of the United States

OCTOBER TERM, 1983

THE ENSIGN-BICKFORD COMPANY, PETITIONER

*v.*

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether regulation of petitioner's conduct under the Occupational Safety and Health Act is preempted, under Section 4(b)(1) of the Act, by virtue of petitioner's contractual obligation to comply with a Department of Defense safety manual.

2. Whether proof of an employer's "plain indifference to" the Act's requirements is sufficient to establish a "willful" violation.

3. Whether Section 5(a)(1) of the Act, the general duty clause, is unconstitutionally vague.

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## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 717 F.2d 1419. The opinion of the administrative law judge (Pet. App. 11a-48a) is digested at 10 O.S.H. Cas. (BNA) 1639.

### JURISDICTION

The judgment of the court of appeals was entered on September 16, 1983. A petition for rehearing was denied on October 20, 1983 (Pet. App. 51a-52a). The petition for a writ of certiorari was filed on January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Petitioner is a manufacturer of explosives and pyrotechnic devices. In 1978, petitioner began producing antitank practice rockets pursuant to a contract with the United

States Department of Defense (DOD). These test weapons carried propellant and an igniter; in place of an explosive charge they had a plastic nose cone containing a pyrotechnic mix that burned brightly on impact, indicating whether a "kill" had been scored. The mix was highly unstable and could explode if exposed to friction, static electricity, or heat. Pet. App. 2a, 11a-12a.

As part of the production process, petitioner's employees were required to fill the nose cones with the pyrotechnic mix, after which they would vacuum the excess powder from the cones and seal the mix into each cone with an adhesive disc. The employees used "pencil vacuums" attached by rubber suction hoses to two vacuum pumps in order to remove the excess powder. Each vacuum system contained a collection chamber that was to prevent the potentially explosive powder from interacting with the friction, static electricity and heat generated in the pumps. On September 14, 1978, one of the pumps exploded, scattering metal fragments that injured six employees, at least one of them seriously. Pet. App. 2a-3a, 12a.

Later that day, compliance officers from the Occupational Safety and Health Administration (OSHA) inspected petitioner's plant. Following that inspection and subsequent interviews with petitioner's employees, the Secretary of Labor issued a citation charging petitioner with willful violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. 654(a)(1), the "general duty clause,"[1] based on its failure to prevent the

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[1]The general duty clause requires that each employer "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. 654(a)(1). To establish a violation, the Secretary of Labor must prove that the employer (1) failed to render its workplace free of a hazard that (2) was recognized, (3) was causing or likely to cause death or serious harm, and (4) was amenable to useful and feasible abatement measures. *National Realty & Constr. Co.* v. *OSHRC*, 489 F.2d 1257, 1265-1267 (D.C. Cir. 1973).

explosive mix from entering the pumps. The citation proposed a $10,000 civil penalty and immediate abatement of the hazard. Pet. App. 3a.

2. Petitioner contested the citation. Following a hearing, an administrative law judge (ALJ) affirmed the citation and proposed penalty (Pet. App. 11a-48a). The ALJ found that the Secretary had proved the elements of a willful violation of the general duty clause: petitioner's collection systems exposed its employees to the hazard of serious bodily injury from explosion that could occur when particles of the mix entered the pumps and ignited; petitioner had notice of the hazard; the workplace could have been rendered free of the hazard by feasible measures; and petitioner's conduct constituted "plain indifference" to the Act's requirements (*id.* at 14a, 39a-42a).[2] The ALJ rejected petitioner's contentions that the general duty clause is unconstitutionally vague and that it cannot support a finding of a willful violation (*id.* at 42a-47a). The ALJ's decision became final when the Occupational Safety and Health Review Commission declined to exercise its discretionary review authority (*id.* at 49a-50a). See 29 U.S.C. (Supp. V) 661(i).

3. The court of appeals affirmed, one judge dissenting (Pet. App. 1a-10a), rejecting each of petitioner's contentions. The court held first that the general duty clause is not unconstitutionally vague, since it has been construed to

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[2]In support of his finding that petitioner's violations were willful, the ALJ noted, inter alia, that: (1) petitioner was aware of, but failed to follow, all four of the safety standards set out in the Department of Defense Contractor's Safety Manual For Ammunition, Explosives and Related Dangerous Materials; (2) petitioner had delegated the design and implementation of the collection systems to a supervisor "whose qualifications in safety matters pertaining to pyrotechnics were 'nill'," and who in turn delegated responsibility to a laborer; and (3) petitioner compounded the hazard by other defaults, including its failure to empty or clean the pumps (Pet. App. 39a-42a).

require only elimination of preventable hazards likely to cause death or serious injury to employees (*id.* at 3a-4a). The court next determined that OSHA regulation of petitioner's conduct was not preempted under Section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1), by virtue of the fact that petitioner was contractually bound to comply with a DOD safety manual (Pet. App. 4a). The court reasoned that such a contractual obligation was not an "exercise [of] statutory authority to prescribe or enforce standards" that would justify preemption (*ibid.*, quoting 29 U.S.C. 653(b)(1)). Rather, "[p]reemption is appropriate only if a federal agency implements the regulatory apparatus necessary to replace those safeguards required by the Act" (Pet. App. 4a (citations omitted)). Finally, the court, accepting the ALJ's findings, found sufficient record evidence to establish petitioner's "plain indifference to," and thus willful violation of, its obligations under the general duty clause (*id.* at 5a-6a). The court held that petitioner's conduct established a willful violation even in the absence of any specific aggravating factor, such as a prior violation of the Act; it concluded that there were "[s]ufficient aggravating circumstances" to support a finding of willfulness where, as here, despite petitioner's manufacturing expertise and knowledge of industry safety standards, it violated those standards "in disregard of the general duty clause and of the safety of its employees" (Pet. App. 7a).

Judge Scalia agreed with the majority's legal analysis, but dissented because he believed that the record lacked sufficient evidence to support a finding of willful violation (Pet. App. 8a-10a). He read the record as proving only that petitioner, in designing and implementing an "inadequate" collection system, "should have known that the industry standards had not been met * * * and should have taken more effective measures to assure compliance" (*id.* at 10a). In Judge Scalia's view, this conduct, without additional

"aggravating factors," constituted a "serious," rather than a willful, violation of the Act (*id.* at 8a, 10a).

## ARGUMENT

The court of appeals correctly applied well established principles developed by the courts under the Occupational Safety and Health Act to the particular facts of this case. The court of appeals' conclusions do not conflict with any decision of this Court or of any other court of appeals and do not warrant further review.

1. Petitioner contends (Pet. 7-10) that OSHA lacked jurisdiction in this case because petitioner was contractually bound to comply with the DOD Contractor's Safety Manual for Ammunition, Explosives and Related Dangerous Materials (DOD Manual).[3] Petitioner relies on Section 4(b)(1) of the Act, 29 U.S.C. 653(b)(1), which exempts from the Act's coverage "working conditions of employees with respect to which other Federal agencies * * * exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

In order to establish Section 4(b)(1) preemption, it is necessary to show both that another federal agency has statutory authority to regulate occupational safety and health matters and that the agency "exercised" that authority by promulgating regulations. See *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d 890, 896 (1st Cir. 1981); *Columbia Gas of Pennsylvania, Inc.* v. *Marshall*, 636 F.2d 913, 915-916 & n.7 (3d Cir. 1980); *Organized Migrants in Community Action, Inc.* v. *Brennan*, 520 F.2d 1161, 1165-1169 (D.C. Cir. 1975). Petitioner has failed to establish either prerequisite for preemption.

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[3]DOD requires that all procurement contracts involving the manufacture of explosives include a provision requiring that the contractor comply with the DOD Manual. See 32 C.F.R. 7-104.79. Petitioner's contract with DOD contained such a clause (Pet. App. 4a, 16a-17a).

The legislative history indicates that Congress intended Section 4(b)(1) to apply only to those instances in which a federal agency possesses statutory authority, either by express terms or by implication from the statutory purposes, to regulate in the area of occupational safety and health. See, *e.g.*, Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess. *Legislative History of the Occupational Safety and Health Act of 1970 (hereinafter cited as Leg. Hist.)* 997 (Comm. Print 1971) (remarks of Rep. Steiger); *id.* at 1019 (remarks of Rep. Daniels); *id.* at 1204 (remarks of Rep. Perkins). Petitioner has not identified any particular statutory provision under which DOD is authorized to protect the safety and health of employees in defense-related industries. DOD does have statutory authority to promulgate procurement regulations "to achieve the efficient, economical, and practical operation of an integrated supply system * * *." 10 U.S.C. 2202. One of these procurement regulations, 32 C.F.R 7-104.79, requires compliance with the DOD Manual. There is no indication, however, that Congress intended to vest DOD with authority over worker safety, or that it intended DOD's general procurement regulations to preempt OSHA jurisdiction. To the extent DOD regulations affect employee health and safety, that effect is incidental to the primary purpose of efficient procurement. As the court below noted, to allow preemption here "would permit any federal agency to dilute, without congressional approval, the safety standards and remedies contained in the Act" (Pet. App. 4a (footnote omitted)). The Occupational Safety and Health Review Commission has held on three occasions that Section 4(b)(1) does not bar issuance of citations under the Act in cases in which another agency's regulations were promulgated pursuant to general statutory procurement authority. See *Luhr Bros., Inc.*, 5 O.S.H.Cas.

(BNA) 1970 (1977); *Haas & Haynie Corp.*, 4 O.S.H.Cas. (BNA) 1911 (1976); *Gearhart-Owen Industries, Inc.*, 2 O.S.H.Cas. (BNA) 1568 (1975).[4]

Even if it possessed express statutory authority to regulate in the area of employee safety and health, DOD did not "prescribe or enforce standards or regulations," as required for Section 4(b)(1) preemption. In order to oust OSHA jurisdiction, an agency must actually exercise its authority by promulgating regulations. See *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d at 896; *Columbia Gas of Pennsylvania, Inc.* v. *Marshall*, 636 F.2d at 915-916 & n.7; *Southern Ry.* v. *OSHRC*, 539 F.2d 335, 336-337 (4th Cir.), cert. denied, 429 U.S. 999 (1976).[5] See also *Leg. Hist.* 1019 (colloquy between Reps. Erlenborn and Daniels), quoted in *Southern Ry.* v. *OSHRC*, 539 F.2d at 337. Inclusion of safety requirements in a contract is not equivalent to promulgation of regulations. In *PBR, Inc.* v. *Secretary of Labor*, 643 F.2d at 896-897, the First Circuit rejected the contention that a consulting engineer's safety rules constituted an exercise of the Secretary of Transportation's rulemaking authority sufficient to trigger Section 4(b)(1). The court held, in language equally applicable here, that "an agency

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[4]The Department of Defense also takes the position that DOD contractors are subject to the Occupational Safety and Health Act. See *Luhr Bros., Inc.*, 5 O.S.H.Cas. (BNA) at 1974.

[5]DOD's promulgation of 32 C.F.R. 7-104.79, which requires contractors to comply with the DOD Manual, does not alter the fact that the obligation is essentially contractual, not regulatory. The sole remedy available to DOD for violation of the Manual's safety standards is contract suspension or termination. See Pet. App. 4a n.3.

may not 'promulgate' a 'rule' through contractual arrangements." 643 F.2d at 897.[6]

Contrary to petitioner's contention (Pet. 9-10), the decision below is fully consistent with decisions of other courts of appeals. In each of the cases in which a court has ruled that the Secretary of Labor was barred by Section 4(b)(1) from exercising his OSHA authority over working conditions, another agency had actually issued regulations in the exercise of express or implied statutory authority to regulate safety and health in the workplace. See *Donovan* v. *Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983) (Coast Guard); *U.S. Air, Inc.* v. *OSHRC*, 689 F.2d 1191 (4th Cir. 1982) (Federal Aviation Administration); *Columbia Gas of Pennsylvania, Inc.* v. *Marshall, supra* (DOT Office of Pipeline Safety); *Organized Migrants in Community Action, Inc.* v. *Brennan, supra* (Environmental Protection Agency). See also *Clary* v. *Ocean Drilling & Exploration Co.*, 609 F.2d 1120 (5th Cir. 1980) (Coast Guard).

2. Petitioner next contends (Pet. 11-14) that the court of appeals erred in holding that petitioner's "plain indifference" to its obligations under the general duty clause established a "willful violation" of the Act.[7] The court of appeals'

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[6]Contrary to petitioner's suggestion (Pet. 8), there is no inconsistency in the ALJ's reliance on the DOD Manual as evidence of expert opinion on safety matters, despite the fact that it is not a regulation for purposes of Section 4(b)(1) preemption. The two issues with respect to which the ALJ considered the Manual — the legal question of the authority of the agency and the evidentiary question of expert opinion on personnel safety in the manufacture of explosives — are quite different.

Petitioner cites (Pet. 10) the possibility of inconsistent regulation in cases like this one. Of course, there was no such inconsistency in this case, as evidenced by the fact that the ALJ relied in part on petitioner's breach of standards set out in the DOD Manual in concluding that it had violated the general duty clause.

[7]Section 17(a) of the Act, 29 U.S.C. 666(a), provides that an employer who "willfully or repeatedly" violates the Act may be assessed civil penalties of up to $10,000. The Act does not include a definition of the term "willful."

construction of "willfulness" as "an act done voluntarily with either an intentional disregard of, or plain indifference to, the Act's requirements" (Pet. App. 5a) comports with the unanimous view of the courts of appeals that have considered the question. See *L.R. Willson & Sons, Inc.* v. *Donovan*, 685 F.2d 664, 667 n.1 (D.C. Cir. 1982); *Universal Auto Radiator Mfg. Co.* v. *Marshall*, 631 F.2d 20, 23 (3d Cir. 1980); *National Steel & Shipbuilding Co.* v *OSHRC*, 607 F.2d 311, 313-316 (9th Cir. 1979); *Georgia Electric Co.* v. *Marshall*, 595 F.2d 309, 319 (5th Cir. 1979); *Kent Nowlin Constr. Co.* v. *OSHRC*, 593 F.2d 368, 372 (10th Cir. 1979); *Cedar Constr. Co.* v. *OSHRC*, 587 F.2d 1303, 1305 (D.C. Cir. 1978); *Empire-Detroit Steel Division* v. *OSHRC*, 579 F.2d 378, 384-385 (6th Cir. 1978); *Western Waterproofing Co.* v. *Marshall*, 576 F.2d 139, 143 (8th Cir.), cert. denied, 439 U.S. 965 (1978); *Intercounty Constr. Co.* v. *OSHRC*, 522 F.2d 777, 779-780 (4th Cir. 1975), cert. denied, 423 U.S. 1072 (1976); *F.X. Messina Constr. Corp.* v. *OSHRC*, 505 F.2d 701, 702 (1st Cir. 1974).

Petitioner suggests that the decision below conflicts with *Frank Irey, Jr., Inc.* v. *OSHRC*, 519 F.2d 1200 (1974), adhered to en banc, 519 F.2d 1215 (3d Cir. 1975), aff'd on other grounds, 430 U.S. 442 (1977), in which the court stated that "[w]illfulness connotes defiance or such reckless disregard of consequences as to be equivalent to a knowing, conscious, and deliberate [flouting] of the Act." 519 F.2d at 1207. However, the Third Circuit has disavowed suggestions that its standard differs significantly from that applied by the other circuits. *Universal Auto Radiator Mfg. Co.* v. *Marshall*, 631 F.2d at 23; *Babcock & Wilcox Co.* v. *OSHRC*, 622 F.2d 1160, 1167-1168 (3d Cir. 1980). To the extent that a distinct willfullness standard may survive in the Third Circuit, it would appear to embody only a difference in emphasis from those decisions employing the "reckless disregard or plain indifference" test; thus, it does not

"rise[] to the level of a 'conflict' among the Circuits" that would warrant review by this Court. See *Cedar Constr. Co.* v. *OSHRC*, 587 F.2d at 1305. Indeed, even before the Third Circuit clarified its standard, this Court twice declined to review the alleged conflict between the Third Circuit and the other courts of appeals. See *Western Waterproofing Co.* v. *Marshall*, 439 U.S. 965 (1978); *Intercounty Constr. Co.* v. *OSHRC*, 423 U.S. 1072 (1976).

Petitioner also contends that the term "willful" must be defined restrictively to avoid an overlap with the definition of a "serious violation" (see 29 U.S.C. 666(b) and (j)). But "serious" violations are defined in terms of the potential consequences of noncompliance (*i.e.*, existence of substantial probability of serious injury) and knowledge of the dangerous condition; willfulness, on the other hand, concerns the employer's state of mind and requires knowledge of both the condition and the requirements of the Act. The court of appeals' construction of "willful" thus retains the distinction between the types of violations described in the Act.

In any event, the court below appears to have found "sufficient aggravating circumstances" (Pet. App. 7a) in the record to support a finding of willfulness, even under the stringent standard petitioner suggests. The court noted that petitioner had actual notice of the explosive properties of the pyrotechnic mix and was aware of accepted industry standards for the safe collection and disposal of such a mix. Nonetheless, petitioner repeatedly ignored these standards by, inter alia, improperly delegating the design and implementation of a collection system to a worker who had no experience in this area, failing properly to test the system, and failing to empty the collection chambers. *Id.* at 5a-7a.[8]

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[8]See also the ALJ's comments at Pet. App. 39a: "Of the four rules contained in the [DOD Manual] which stand for the preponderent expert opinion on employee safety practice applicable herein * * *

3. Petitioner finally contends (Pet. 14-17) that the general duty clause is unconstitutionally vague. The court below, like the other courts that have addressed this issue (*Donovan* v. *Royal Logging Co.*, 645 F.2d 822, 831-832 (9th Cir. 1981); *Bethlehem Steel Corp.* v. *OSHRC*, 607 F.2d 871, 875 (3d Cir. 1979); *Georgia Electric Co.* v. *OSHRC*, 595 F.2d at 322 n.32), properly rejected this claim (Pet. App. 3a-4a).

In considering civil remedial legislation such as the Occupational Safety and Health Act, the purported vagueness of a standard is judged in light of its application to the facts of a case. See *Faultless Division* v. *Secretary of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982); *McLean Trucking Co.* v. *OSHRC*, 503 F.2d 8, 10-11 (4th Cir. 1974); *Ryder Truck Lines, Inc.* v. *Brennan*, 497 F.2d 230, 233 (5th Cir. 1974). The statute will pass constitutional muster so long as it affords reasonable warning of proscribed conduct in light of common understanding and practice. *McLean Trucking Co.* v. *OSHRC*, 503 F.2d at 10; *Ryder Truck Lines, Inc.* v. *Brennan*, 497 F.2d at 233. Any indefiniteness may be cured through existing interpretations of the terms of the statute. See, *e.g.*, *Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35, 48-49 (1966).[9]

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[petitioner] failed to comply with all four. This speaks eloquently of the quality of [petitioner's] defaults. One could be an oversight or even possibly two, but not four out of four."

[9]Petitioner notes (Pet. 15) that a willful violation of the Act may result in both civil and criminal penalties. However, criminal penalties are not available for a violation of the general duty clause. Of course, it is a civil penalty, not a criminal penalty, that is at issue in this case.

The courts have universally adopted an objective test for measuring compliance with the general duty clause. The test requires the Secretary to prove, inter alia, that the hazard was recognized and preventable. See *National Realty & Constr. Co.* v. *OSHRC*, 489 F.2d 1257, 1265-1267 (D.C. Cir. 1973).[10] See also note 2, *supra*. As the court below noted, "[t]his standard provides employers with sufficiently specific notice of the requirements of the general duty clause" (Pet. App. 3a-4a (citation omitted)). Here, the ALJ and the court of appeals concluded that petitioner was aware of both the explosive properties of the pyrotechnic mix and the accepted industry standards for the safe collection and disposal of the mix (*id.* at 5a, 7a, 39a). Thus, petitioner had sufficient notice under the objective test.

Where objective benchmarks provide an employer with sufficient notice of the requirements of the Act, a willful violation can be established by proving reckless disregard of, or plain indifference to, those requirements. Accordingly, several courts have affirmed findings of willful violation of the general duty clause. See *Central Soya de Puerto Rico, Inc.* v. *Secretary of Labor*, 653 F.2d 38 (1st Cir. 1981); *Empire-Detroit Steel Division* v. *OSHRC*, *supra*. Since the record in this case clearly supports the finding that petitioner exhibited plain indifference to the requirements of the Act, as measured by objective standards, the finding of a willful violation was entirely proper.

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[10] Accord, *Carlyle Compressor Co.* v. *OSHRC*, 683 F.2d 673, 676 (2d Cir. 1982); *Titanium Metals Corp. of America* v. *Usery*, 579 F.2d 536, 540, 543 (9th Cir. 1978); *Empire-Detroit Steel Division* v. *OSHRC*, 579 F.2d at 383-384; *Usery* v. *Marquette Cement Mfg. Co.*, 568 F.2d 902, 909 (2d Cir. 1977); *Getty Oil Co.* v. *OSHRC*, 530 F.2d 1143, 1145 (5th Cir. 1976).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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